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Wharton: Let's hope the Sagebrush Rebellion fails

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The Utah Legislature, Gov. Gary Herbert and the majority of Utah's congressional delegation seem hell-bent on taking the U.S. government to court in a revolutionary effort to upend the way Western federal lands are managed.

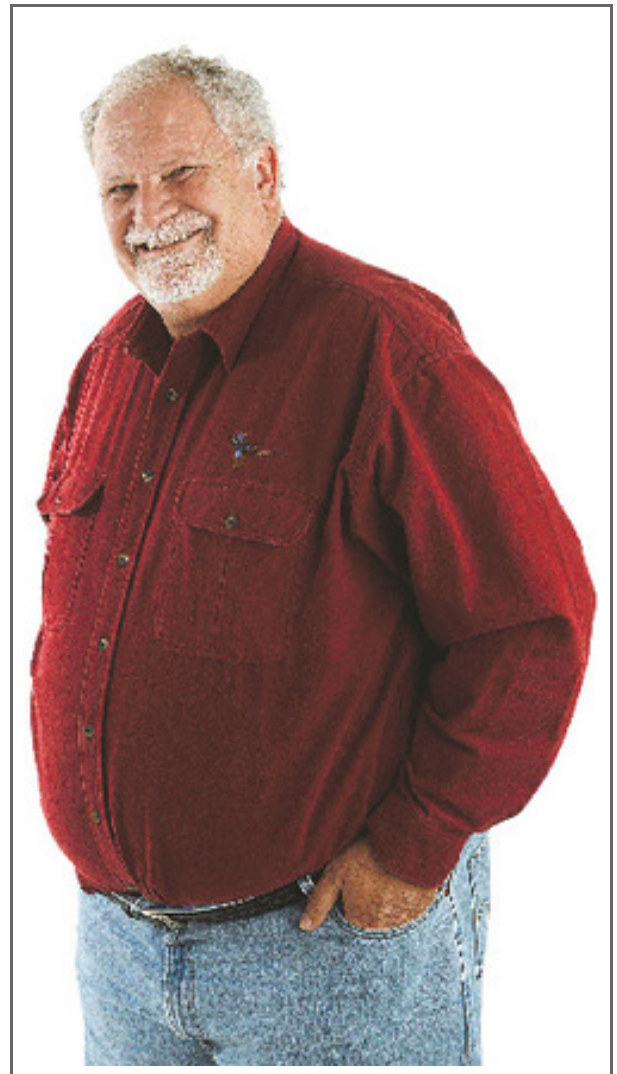
Since much of the state's multimillion-dollar outdoor recreation, hunting and tourism industry takes place on these public lands, outdoor enthusiasts have much at stake.

This is especially true because Utah does not have the infrastructure, people, money or environmental regulations in place to protect these lands. Our politicians see dollar signs everywhere but ignore the fact that there will also be management costs.

Worse, our politicians don't seem particularly interested in protecting public lands. They seem more inclined to exploit or sell them.

The real fear for outdoor enthusiasts should be "crony capitalism," in which public lands are cheaply disposed of to developers or energy interests with well-connected Utah political friends.

All one has to do is to look at a measure Utah's four Republican members of Congress are pushing to force the U.S. Forest Service to sell 30 acres of prime watershed property in Big Cottonwood Canyon to allow The Canyons ski area, owned by a Canadian company, to build a lift connecting it with Solitude. This is being done against the wishes of Salt Lake County and Salt Lake City as well as the U.S. Forest Service master plan.



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Perhaps those who love living in a “public lands state” worry too much. Most legal experts think Utah has little chance of actually prevailing and receiving control of these lands.

The Utah Legislature’s own Office of Legislative Research and General Counsel has told lawmakers that these land-grab laws will more than likely be declared unconstitutional. It cites the enclave and property clauses of the U.S. Constitution, the Enabling Act that allowed Utah to become a state and nine U.S. Supreme Court decisions as reasons the federal government will win.

“I’d advise against litigation,” says Robert Keiter, a University of Utah law professor and director of the Wallace Stegner Center for Land, Resources and the Environment. “The chances for success are quite low in a courtroom. The legislation adopted has more resonance as a political statement than for its legal viability in a courtroom.”

But what about Section Nine of the Utah Enabling Act passed in 1894 that opened the way for statehood? This is the language legislators claim could lead them to victory in court.

This is what it says:

“That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within the State.”

Keiter says that in his judgment, Section Nine reflects the policy the federal government was pursuing regarding the public lands when the Enabling Act was passed. At that time, the policy was to dispose of federal lands the government was not keeping for other purposes.

“It was worth noting that, by that time, Congress was beginning to establish national parks and forest reserves, which eventually became national forests,” he said. “That was the precedent for the government retaining some of the federal lands in public ownership.”

Kreiter also argues that intent of the Section Nine provision requires the land to be sold to people, not the state.

“There is no provision in there for disposal of the lands back to the states,” he said. “I don’t know how the state has a claim that the federal government ought to turn the lands back to it.”

The bottom line:

Keiter thinks it is highly unlikely that the courts will overturn the entire Western public land system based on that provision.

But Utah’s governor and legislators seem ready to gamble millions of dollars on this dubious cause. Hunters, off-highway vehicle enthusiasts, backpackers, campers and all the businesses that rely on Utah’s great outdoors can only hope the experts are correct and this poorly thought-out Sagebrush Rebellion is ultimately quashed by the courts.

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